

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROBERT PRESTON,	)	No. C 06-5175 RMW (PR)
	)	
Plaintiff,	)	ORDER REGARDING
	)	PENDING MOTIONS;
v.	)	INSTRUCTIONS TO CLERK
	)	
OFFICER HAND, et. al.,	)	
	)	
Defendants.	)	(Docket Nos. 7, 11, 12, 14, 16,
	)	17, 22, 25, 27)

Plaintiff, a state prisoner proceeding pro se, filed the instant civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff has been granted leave to proceed in forma pauperis. On March 30, 2007, the court order service of the complaint on the named defendants. Plaintiff has filed several miscellaneous motions. Defendants have filed a motion to dismiss the complaint for plaintiff's failure to exhaust administrative remedies. Plaintiff has filed an opposition. Although directed to do so, defendants did not file a reply. The court will address plaintiff's pending motions and issue a further scheduling order regarding defendants' motion to dismiss as set forth below.

///

## DISCUSSION

### A. Plaintiff's Motion to Add Documents

Plaintiff has filed a motion to proceed to add on documents. In his motion, plaintiff submitted a copy of a Monterey Superior Court order granting defendants' demurrer in case no. M81135, Robert Preston v. Correctional Officer R.L. Hand, et al., dated January 22, 2007. The court will GRANT plaintiff's motion to add documents (docket no. 7). The court will consider the Monterey Superior Court order as an exhibit to plaintiff's opposition to the pending motion to dismiss.

### B. Plaintiff's Motions to Add Information and Claim

Plaintiff has filed a "motion request to add on reinjured plaintiff." In his motion, plaintiff states that he suffered a further injury to his back on April 25, 2007. Plaintiff alleges that this injury is based on the retaliatory conduct of defendant Lira and three other defendants not named in the instant complaint. Plaintiff requests to add a claim of retaliation against these defendants.

The court notes that Plaintiff's claim concerning his April 2007 injury is not before the court in the instant complaint. This new claim names additional defendants not named in the instant complaint. Additionally, it appears that this April 2007 retaliation complaint is not exhausted. Plaintiff must address this issue through the administrative process available to plaintiff pursuant to 42 U.S.C. § 1997e(a).

In order to exhaust available administrative remedies within the state prison system, a prisoner must proceed through several levels of appeal: (1) informal resolution, (2) formal written appeal on a CDC 602 inmate appeal form, (3) second level appeal to the institution head or designee, and (4) third level appeal to the Director of the California Department of Corrections. Barry v. Ratelle, 985 F. Supp. 1235, 1237 (S.D. Cal. 1997) (citing Cal. Code Regs. tit. 15, § 3084.5). A final decision from the Director's level of review satisfies the exhaustion requirement under § 1997e(a). Id. at 1237-38. Courts do not have discretion under § 1997e(a) to excuse exhaustion. Id. at 1825 n.5. Accordingly, plaintiff's motion to add a claim and name new defendants based on his April 2007 injury (docket no. 11) is DENIED without prejudice.

\\

1 Plaintiff also filed a “motion request for add on admissions and truth of facts.” In his  
2 motion, plaintiff requests that the defendants answer the statements and questions attached to his  
3 motion. The court notes that plaintiff’s request is characterized as a motion, however, it is a  
4 discovery request for interrogatories. Accordingly, the court DENIES plaintiff’s motion to add  
5 admissions and truth of facts (docket no. 12) without prejudice.

6 For plaintiff’s information, the proper manner of promulgating discovery is to send  
7 demands for documents or interrogatories (questions asking for specific, factual responses)  
8 directly to defendants’ counsel. See Fed. R. Civ. P. 33-34. The scope of discovery is limited to  
9 matters “relevant to the claim or defense of any party . . .” See Fed. R. Civ. P. 26(b)(1).  
10 Discovery may be further limited by court order if “(i) the discovery sought is unreasonably  
11 cumulative or duplicative, or is obtainable from some other source that is more convenient, less  
12 burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by  
13 discovery in the action to obtain the information sought; or (iii) the burden or expense of the  
14 proposed discovery outweighs its likely benefit.” Fed. R. Civ. P. 26(b)(2). Accordingly,  
15 plaintiff may submit any discovery requests directly to defendants’ counsel.

16 C. Plaintiff’s Motions for Default Judgment

17 Plaintiff has filed two motions for default judgment. Plaintiff states that defendants did  
18 not file a motion or respond to the court’s March 30, 2007 order of service within sixty days, as  
19 set forth in the court’s order. However, according to the court’s docket, the summons and copy  
20 of the complaint were issued to the defendants on April 25, 2007. Summons were returned  
21 executed showing service on defendants Lira and Castle on June 19, 2007, and service on  
22 defendant Hand on June 25, 2007. On July 23, 2007, defendants responded by filing a letter to  
23 the clerk stating that a waiver of service was sent to defendants on May 29, 2007. See docket no.  
24 24. Therefore, defendants response was due by July 28, 2007 pursuant to Federal Rule of Civil  
25 Procedure 4(d)(3). Defendants filed a motion to dismiss on July 27, 2007 (docket no. 25).  
26 Accordingly, defendants have timely responded to the court’s order of service. Plaintiff’s  
27 motions for default judgment (docket nos. 14, 22) are DENIED.

28 \\\

1 D. Plaintiff's Motion Regarding Jurisdiction and Motion of Opposition to Notice of  
 2 Demurrer

3 Plaintiff has filed a "motion of jurisdiction of statements." In his motion, plaintiff states  
 4 that he will identify the basis for federal jurisdiction. However, plaintiff's motion provides  
 5 details concerning his Monterey Superior Court case, no. M81135, Robert Preston v.  
 6 Correctional Officer R.L. Hand, et al. As set forth in the order of service, this court has  
 7 jurisdiction over plaintiff's civil rights claims in the complaint pursuant to 42 U.S.C.  
 8 § 1983. Accordingly, plaintiff's motion for jurisdiction (docket no. 16) is DENIED as moot.

9 Plaintiff also filed a motion for opposition, notice of demurrer and motion to quash  
 10 service of summons to stay or dismiss action. The court notes that plaintiff's motion concerns  
 11 his state court case in the Monterey Superior Court, listed above. Accordingly, plaintiff's  
 12 motion (docket no. 17) is DENIED as moot.

13 E. Motion for Extension of Time

14 Plaintiff filed a motion for extension of time to file his opposition to defendants' motion  
 15 to dismiss on August 14, 2007. Thereafter, plaintiff filed his opposition on August 23, 2007.  
 16 Plaintiff's motion for extension of time (docket no. 27) is DENIED as moot because plaintiff has  
 17 timely filed his opposition.

18 F. Defendants' Motion to Dismiss

19 Defendants filed a motion to dismiss the complaint for plaintiff's failure to exhaust  
 20 administrative remedies and Plaintiff has filed opposition. In the opposition, plaintiff alleges  
 21 that he timely re-submitted his administrative appeal, however, the appeal was held by the  
 22 appeals coordinator for six months. Plaintiff submitted documentation concerning his  
 23 allegations and alleges that the entire record of his administrative appeals has not been submitted  
 24 to the court.

25 Although directed to do so, defendants did not file a reply brief. It appears that  
 26 defendants did not receive a copy of plaintiff's opposition and supporting documents. The court  
 27 will allow defendants an opportunity to respond to plaintiff's arguments and to clarify the  
 28 alleged timely admission of his appeal and whether the entire record of his administrative

appeals through the Director's level of review has been submitted to the court.

Accordingly, defendants' motion to dismiss (docket no. 25) is DENIED without prejudice. The clerk is instructed to send defendants' counsel a copy of plaintiff's opposition and supporting documents (docket no. 28). Defendants shall file a reply brief as set forth in the scheduling order below. Once the reply brief is submitted, the court will reconsider the motion to dismiss.

### CONCLUSION

1. Plaintiff's motion to add documents (docket no. 7) is GRANTED. The court will consider the Monterey Superior Court order as an exhibit to plaintiff's opposition to the pending motion to dismiss.

2. Plaintiff's motion to add a claim based on his April 2007 injury (docket no. 11) is DENIED without prejudice.

3. Plaintiff's motion to add admissions and truth of facts (docket no. 12) is DENIED without prejudice.

4. Plaintiff's motions for default judgment (docket nos. 14, 22) are DENIED.

5. Plaintiff's motion for jurisdiction (docket no. 16) is DENIED as moot.

6. Plaintiff's motion for opposition, notice of demurrer and motion to quash service of summons to stay or dismiss action (docket no. 17) is DENIED as moot.

7. Plaintiff's motion for extension of time (docket no. 27) is DENIED as moot.

8. Defendants' motion to dismiss (docket no. 25) is DENIED without prejudice and CONTINUED in order for defendants to reply to plaintiff's opposition.

9. The clerk is instructed to send defendants a copy of plaintiff's opposition (docket no. 28).

10. Defendants shall file a reply brief **within thirty (30) days** of receipt of plaintiff's opposition. Once the reply brief is submitted, the court will reconsider the motion to dismiss.

11. It is plaintiff's responsibility to prosecute this case. All communications by the plaintiff with the court must be served on defendants, or defendants' counsel, by mailing a true copy of the document to defendants or defendants' counsel.

\\

1 Plaintiff must keep the court and all parties informed of any change of address and must comply  
2 with the court's orders in a timely fashion. Failure to do so may result in the dismissal of this  
3 action for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b).

4 IT IS SO ORDERED.

5 DATED: 3/19/08

  
\_\_\_\_\_  
6 RONALD M. WHYTE  
United States District Judge